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IN THE

Supreme Court of the United States

No. 535.

C. W. TITUS, *Petitioner*,

v.

THE UNITED STATES OF AMERICA, *Respondent*.

REPLY TO GOVERNMENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI.

I.

The Government's first ground of opposition (Br. 6) is:

> "Since the bar of the statute of limitations has fallen with respect to the year 1928 (R. 24, 26), moreover, no tax can be imposed with respect to the receipt of income at that time."

Consequently, it argues that certiorari should be denied.

The position of the Government on this point is directly contrary to (1) the statute and (2) the law established by this Court.

In order to secure certainty in connection with taxation, Congress, in the 1928 Act, enacted Sections 607 and 609, which are now Sections 3770 and 3775, Internal Revenue Code.

The Sections mentioned provide that if a tax is collected or credited after the expiration of the statute of limitations, such assessment or credit is an overpayment which must be refunded.[1]

This Court passed squarely on Section 607 of the 1928 Act in *McEachern* v. *Rose*, 302 U. S. 56, 19 A. F. T. R. 1207. In the *McEachern* case, returns were filed which were "erroneous in point of fact and of law." The Government contended that, in view of the erroneous statements of fact in the returns, the taxpayer was estopped to deny the correctness of such statements. This Court held that equitable principles would ordinarily prevail. However, because Congress had enacted Section 607, the statute must prevail over equity. In the *McEachern* case, the Court clearly distinguishes *Stone* v. *White*, 301 U. S. 532, 19 A. F. T. R. 503. The *Stone* case involved a situation where the beneficiary of a trust wholly failed to report certain income received by her.[2]

In the Revenue Act of 1938, Congress took cognizance of the *McEachern* decision in Section 820, "Mitigation of Effect of Limitations and Other Provisions in Income Tax Cases," which is retained in the Internal Revenue Code as Section 3801.[3] The purpose of the Section is to prevent taxpayers or the Government from taking inconsistent positions in later years as compared with that taken in prior outlawed years. In such circumstances adjustment can be made for the prior years, irrespective of the statute of limi-

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[1] The Sections and the Finance Committee Report explaining them are set out in the appendix to this reply, at page 5.

[2] The *McEachern* decision is in line with the better thought on the subject of applying equitable principles to tax cases. See the excerpt from the Report of the Standing Committee on Federal Taxation, American Bar Association, September, 1937, which is set out in the appendix to this reply, at page 6.

[3] The Section and the Finance Committee Report explaining this section are set out in full in the appendix to this reply, at pages 7 and 11, respectively.

tations. However, the Conference Committee added subsection (f), which states:

> "No adjustment shall be made under this section in respect of any taxable year beginning prior to January 1, 1932."

The most that can be said of the case at bar is that the taxpayer has taken an inconsistent position. The first position was taken prior to January 1, 1932. In view of the specific statutory direction that no adjustment be made in respect of any year beginning prior to January 1, 1932, the position of the Government is clearly in error. This is true because "The entire Federal tax structure is a creature of Congress." *New Hampshire Fire Insurance Co.*, 2 T. C. 708, 722, affirmed (C. C. A. 1) 146 F. (2d) 697.

II.

At page 5, the Government's reply states, "There was here an association of three persons * * *."

The Government then asks this Court to dispose of this case because three persons signed a trust instrument. This unrealistic taxation is sought despite the findings of the courts below, as follows:

The District Court found (R. 26):

> "No doubt, this actually was a business conducted in the name of a trust for the sole benefit of plaintiff * * *."

The Circuit Court of Appeals stated (R. 85):

> "For all practical purposes, Titus was the sole owner of this business."

The real question here involved is whether this Court is going to permit the taxation as an association of a business which both lower courts distinctly state was the sole business of Titus. In view of the findings of the lower courts, it is obvious that the decision in this case is in conflict with *Morrissey* v. *Commissioner*, 296 U. S. 344.

III.

The Government admits (Br. 7) that *Commissioner* v. *Gibbs-Preyer Trusts*, 117 F. (2d) 619, holds "to the effect that the test, in determining whether a trust is an association, must be found in what the trustees actually do rather than in the existence of unused powers."

The decision in the *Gibbs-Preyer* case unequivocally states the rule to be as indicated. An effort to evade unequivocal language of respected courts can mean only confusion, uncertainty, and ever-increasing litigation.

CONCLUSION.

The writ of certiorari should issue.

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